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IN THE

Supreme Court of the United States

October Term, 1984

CONTRACTOR UTILITY SALES CO., INC.,
Respondent,

v.

CERTAIN-TEED CORPORATION,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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54 pp

QUESTION PRESENTED

Whether a Court of Appeals' refusal to decide the principal issue on appeal, involving plain and highly prejudicial error, represents such a gross departure from the accepted and usual course of judicial proceedings as to warrant the exercise of this Court's supervisory powers, particularly where, as in this case, its effect is to uphold a judgment for $3,802,000 on a record devoid of competent proof of damages.

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CONTRACTOR UTILITY SALES CO., INC.,
Respondent,

v.

CERTAIN-TEED CORPORATION,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CERTAIN-TEED CORPORATION prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on November 9, 1984, and that the Court of Appeals be summarily directed to address and to decide the principal issue before it on the appeal, which it has failed and refused to decide.

OPINION BELOW

The Court of Appeals affirmed a judgment entered on a verdict for $3 million in punitive damages and $802,000 in compensatory damages. The opinion is reported at 748 F.2d 1151 and is reproduced in the appendix to this petition. App. at 1a. An earlier opinion in this case, which reversed a judgment for plaintiff entered after the first trial, is reported at 638 F.2d 1061 (7th Cir. 1981).

JURISDICTION

The judgment of the Court of Appeals was entered on November 9, 1984, and a timely petition for rehearing and suggestion for rehearing *in banc* was filed on November 21, 1984. App. at 19a. The petition was denied on December 13, 1984 (App. at 35a), but the mandate of the Court of Appeals has been stayed, by order of that court, until January 21, 1985. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Sec. 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

Rule 101, Federal Rules of Evidence:

> These rules govern proceedings in the courts of the United States and before United States magistrates, to the extent and with the exceptions stated in rule 1101.

Rule 803(6), Federal Rules of Evidence:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * *
>
> (6) *Records of regularly conducted activity.* A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness,

unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Rule 1006, Federal Rules of Evidence:

> The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

Rule 28(a)(2) of the Federal Rules of Appellate Procedure:

> (a) Brief of the Appellant. The brief of the appellant shall contain under appropriate headings and in the order here indicated:
>
> * * *
>
> (2) A statement of the issues presented for review.
>
> * * *

28 U.S.C. § 1291:

> **Final decisions of district courts** The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

STATEMENT OF THE CASE

This diversity action, brought by a distributor of polyvinylchloride pipe against the manufacturer, arises out of a sales agency agreement that was in effect between September 2, 1975, and May 31, 1977. At the first trial, plaintiff claimed that it had been fraudulently induced to sign the agreement by a false promise that it would be kept "competitive", and that the defendant had breached the agreement's implied obligation of good faith and fair dealing.[1] The jury returned a verdict for $2.4 million in compensatory damages and $7.38 million in punitive damages. That verdict was reversed on appeal in January, 1981, and the case was remanded for a retrial of the same claims.[2] After the retrial, another jury returned a verdict of $802,000 in compensatory damages and $3 million in punitive damages, and both parties appealed.

The judgment entered on the second verdict was affirmed by the Seventh Circuit on November 9, 1984. The first issue raised by defendant in its appeal, as set forth in the Statement of the Issues Presented for Review required by Fed. R. App. P. 28(a)(2), was as follows:

> Whether the trial court's admission of a hearsay summary of unidentified records of a third party as the sole evidence of damages offered by plaintiff on either count of its complaint constituted reversible error.

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[1] By the time of the first trial, plaintiff had amended its complaint four times. In addition to the common law claims for fraud and breach of contract, the amended complaint contained five counts alleging various conspiracies under the antitrust laws. A directed verdict was entered for defendant on all the antitrust claims at the close of plaintiff's proof, and that order was affirmed on the first appeal. *Contractor Utility Sales Co., Inc. v. Certain-teed Products Corp.*, 638 F.2d 1061 (7th Cir. 1981).

[2] *Contractor Utility Sales Co., Inc. v. Certain-teed Products Corp.*, 638 F.2d 1061 (7th Cir. 1981).

D. Br. at vii.[3] Discussion of this issue occupied 14 pages of defendant's principal brief and nine pages of its reply brief. Yet there is not a single word in the Court of Appeals' opinion that even acknowledges the existence of this issue, let alone addresses it. Defendant's petition for rehearing *in banc*, which was based solely on this omission, was summarily denied on December 13, 1984. App. at 22a, 35a.

REASONS FOR GRANTING THE WRIT

1. *Summary.*

Petitioner is not seeking a writ of certiorari to obtain another level of appellate review, but rather to obtain relief from a gross departure from the accepted and usual course of judicial proceedings that, by depriving petitioner of its right of appeal, has made a mockery of the appellate process.

The Court of Appeals could not rationally have affirmed the judgment if it had addressed the first issue raised by the defendant; it would have been compelled to reverse and remand the case for a new trial, because the sole evidence of damages offered by plaintiff was erroneously admitted. That evidence consisted of a sheaf of 13 handwritten pages, first disclosed to defendant literally on the eve of the second trial, which purported to summarize millions of dollars in sales, allegedly made by one of defendant's competitors over a six-year period. Tr. I at 44,[4] Sep. App.[5] In this manner, plaintiff sought to prove the sales it would have made (and, therefore,

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[3] Defendant's initial brief in the Court of Appeals will be identified, hereafter, as "D.Br." Defendant's reply will be designated "D.Reply." Plaintiff's briefs will be identified as "P.Br." and "P. Reply" respectively.

[4] This is a reference to volume and page number of the trial transcript.

[5] This abbreviation refers to the Separate Appendix, filed with this Petition, which contains a copy of P.Ex. 70, the document at issue on defendant's appeal.

its damages) if it had not been "fraudulently induced" to become defendant's agent.

The summaries had been prepared several years before the trial, by an unidentified employee of defendant's competitor, for use by another employee in preparing for a deposition. Tr. II at 229-30; Tr. III at 3-4. Although the ostensible basis on which these notes were offered at the trial was that they were business records under Fed. R. Evid. 803(6), they did not meet the requirements of that exception to the hearsay rule, and plaintiff abandoned that theory on appeal.[6] Nor were the papers admissible as summaries of voluminous documents under Rule 1006 of the Federal Rules of Evidence. The underlying records were never even identified, let alone shown to be admissible, and they were not made available for examination by defendant, as clearly required by that rule.

The admission of these summaries was flagrant and reversible error that no reviewing court addressing the point could fail to recognize. The only rational explanation for the court's refusal to address it is that the court, believing that this lawsuit had consumed enough judicial resources, chose to end it by the simple expedient of ignoring reversible error. In disposing of a meritorious appeal in this manner, the court undermined the integrity of the appeals process itself. This Court should summarily reverse and remand with directions that the Seventh Circuit provide petitioner the appellate review to which it is entitled.

2. The Court of Appeals' Opinion Reflects A Conscious Decision To Ignore Clear and Reversible Error So As To Avoid A Reversal And A Third Trial.

Had the Court of Appeals addressed the primary issue before it, it would have had to acknowledge that admission of

[6] See note 8, *infra.*

the summaries constituted a plain and highly prejudicial violation of the Federal Rules of Evidence. Inasmuch as the error admitted the only evidence offered on the issue of damages, a reversal would have been unavoidable. If the issue had been addressed, a credible opinion affirming the judgment could not have been written.

There are only two conceivable explanations for the court's failure to address the issue; the court either overlooked it, or simply chose not to address it because it did not wish to reverse and remand the case for a third trial. But the panel's omission was brought to its attention, and to that of the full Court of Appeals, in a petition for rehearing *in banc.* App. at 19a. Therefore, the court could not have overlooked the issue, and the only credible explanation is that it simply wished to put an end to litigation it believed had lasted long enough, and was willing to condone reversible error to do so.

3. Both The Right of Appeal Provided By Congress And Fundamental Fairness Are Flouted If A Court Of Appeals Is Allowed To Ignore Plain And Reversible Error.

Congress has given litigants in the federal system an absolute right to appeal from final judgments entered in the district courts. 28 U.S.C. §1291; *Coppedge v. United States,* 369 U.S. 438, 441 (1962). That right would be almost meaningless if courts of appeals were free to choose the issues they wished to decide, and to ignore others that, if addressed, would compel an "undesirable" result. It is difficult to imagine a clearer abdication of judicial responsibility than a court's refusal to decide a dispositive issue properly before it, and we respectfully submit that a failure by this Court to correct such an occurrence would amount to an abdication of its own supervisory power.

The Court of Appeals apparently could not bring itself to send this case back for a third trial, with the additional

expenditure of already-taxed judicial resources that a second retrial would entail. Instead, it chose the expedient of simply ignoring the trial court's error. But parties are entitled to have the Federal Rules of Evidence, which "govern proceedings in the Courts of the United States" (Fed.R.Evid. 101), applied in a retrial as well as in the first trial. While the court's reluctance to burden the judicial system is understandable, that concern is far outweighed by the fundamental principle of due process the court has flouted in this case.

In the long run, failure to enforce the law will also fail to serve the interest of expediency. Reversal of the first verdict in this case, for example, resulted from plain and prejudicial error induced by plaintiff's adamant and unfounded objections to the introduction of evidence that was plainly admissible.[7] Had the trial judge followed the law, this case might well have been concluded years ago. The error committed at the second trial was, if anything, even clearer and more prejudicial than that committed at the first trial.

Furthermore, because the Court of Appeals could not have addressed the primary issue raised by defendant and affirmed without creating a conflict with prior opinions in its own and in other circuits, its decision to ignore that issue hampers this Court's ability to achieve uniform application of federal law by undermining its power of review. A case that is decided contrary to established principles of federal law is no less wrong simply because the error is not apparent on the face of the opinion. If anything, such an opinion is more subversive of the rule of law than one that overtly misapplies it.

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[7] *Contractor Utility Sales Col., Inc. v. Certain-teed Products Corp.*, 638 F.2d 1061, 1083 (7th Cir. 1981).

4. The Effect Of The Opinion Below Is To Sanction Plain And Reversible Error.

At the first trial, the testimony of plaintiff's damages expert was stricken as "grossly speculative," but not until after it had been presented to the jury. Following the remand, defendant moved *in limine,* well in advance of the retrial, to exclude essentially the same testimony, and that motion was granted. Thereafter, the retrial was delayed for over a year by plaintiff's unsuccessful interlocutory appeal and by the trial judge's retirement.

The retrial began on Monday, February 28, 1983. Late the preceding Friday, plaintiff delivered to defendant 13 pages of handwritten notes that defendant had never seen before, and which had not been listed in a comprehensive pre-trial order that had been in effect for more than a year. Tr. I at 44, Sep. App. After the trial had started, it was revealed that plaintiff had been planning to use the summaries for months. Tr. II at 21; Tr. V at 188; App. at 14a.

The notes purported to summarize millions of dollars in sales, allegedly made by one of defendant's competitors, in 12 states and over a six-year period ending on June 30, 1979. Plaintiff contended that those were sales it would have made but for defendant's alleged misconduct. Tr. VI at 172-174. Defendant never disputed the relevance of such evidence, but objected to its admission in the form offered by plaintiff, since there was no way to test its reliability. Tr. V at 188-192; Tr. VI at 72-86; App. at 12a, *et seq.* The summaries were inadmissible hearsay, and plaintiff was unable even to identify the underlying records, much less to make them available for examination as expressly required by Rule 1006 of the Federal Rules of Evidence. Although the trial judge realized that it was impossible for defendant to respond to this type of evidence without being given access to the underlying records, the

summaries were admitted, ostensibly on the ground that they constituted "business records," a ground that even plaintiff abandoned after the trial.[8] Tr. V at 187-190; App. at 14a-15a, 17a.

a. The evidence was inadmissible hearsay.

Plaintiff's only attempt to lay a foundation for admission of the notes was through testimony that they had been prepared by someone in the competitor's data processing department to assist the witness in preparing for a 1979 deposition in this case.[9] Tr. II at 229-230; Tr.III at 3-4. There was no proof, as required by Fed. R. Evid. 803(6), (a) that the notes were prepared at or about the time of the events summarized, or (b) that it was the regular practice of defendant's competitor to maintain and use them in the ordinary course of its business. Indeed, the proof was to the contrary, and the trial court's decision to admit the summaries under the business record exception to the hearsay rule was unquestionably erroneous,[10]

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[8] On appeal, plaintiff argued only the following: (1) that defendant had been under a duty to request a recess in the trial to permit plaintiff to find the preparer of the summaries and to make him available for a deposition (P.Br. at 29, 32; P. Reply at 8-9; see note 13, *infra*), (2) that admission of hearsay is discretionary (P.Br. at 30, 32, 33-35), and (3) that hearsay should be admitted unless the opponent can demonstrate that it is inaccurate. P.Br. at 30-32. None of these propositions can be supported.

[9] No reference to the summaries was made in the deposition, the documents were not produced, and defendant had no knowledge of their existence before the Friday before the trial started. D. Reply at 26, n. 15.

[10] *United States v. Lemire*, 720 F.2d 1327, 1350 (D.C. Cir. 1983) (Rule 803(6) does not allow admission of document recorded one year and ten months after events described); *Campbell v. Nordco Products*, 629 F.2d 1258, 1265 (7th Cir. 1980) (Rule 803(6) does not allow admission of records prepared for litigation, even if prepared by a non-party).

as plaintiff virtually conceded by abandoning, on appeal, the business record argument asserted at the trial.

b. Neither of the prerequisites for the admission of summaries under Rule 1006 was satisfied in this case.

The summaries were also inadmissible under Federal Rule of Evidence 1006. First, the documents purportedly summarized were never identified, much less shown, themselves, to be admissible as required, *inter alia,* by the Seventh Circuit's own opinion in *Needham v. White Laboratories, Inc.*[11] Second, the underlying records were never made available to defendant for examination as required by the express language of Rule 1006.[12] Without a proper foundation, admission of the summaries over defendant's objection was plain and reversible error.

> The requirement of Rule 1006 that the original or duplicate writings . . . be made available for examination . . . at a reasonable time and place acts as a condition precedent which must be fulfilled before a summary . . . may be admitted as evidence. Rule 1006 does not give the judge discretionary power to waive this condition.

5 Weinstein's Evidence (Matthew Bender, 1983), 1006[04], pp. 1006-8.[13]

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[11] 639 F.2d 394, 403 (7th Cir. 1981). Accord: *United States v. Johnson,* 594 F.2d 1253, 1255 (9th Cir. 1979), *cert. denied,* 444 U.S. 964 (1979).

[12] *Square Liner 360 v. Chisum,* 691 F.2d 362, 376 (8th Cir. 1982); *United States v. Kim,* 595 F.2d 755, 764 (D.C. Cir. 1979).

[13] Plaintiff's only response to defendant's argument concerning Rule 1006 was that defendant had somehow waived its objection to the summaries by rejecting plaintiff's suggestion, made in the middle of the trial, that defendant depose the person who had prepared them —if he could be found. P.Br. at 29, 32; But this offer was neither timely nor adequate. D. Br. at 18-19. In *Square Liner 360 v. Chisum,* 691 F.2d 362 (8th Cir. 1982), the Eighth Circuit held that it was error to have admitted a summary without the underlying records having been made available, even though in that case the person who

(footnote continued on following page)

Defendant's objection was not academic. Without the opportunity to review the underlying records, defendant had no basis for determining what had been summarized, much less whether the summaries were accurate. The underlying records might have shown, for example, that the summaries included sales of unrelated products, or sales that were made to customers other than those with whom plaintiff did business.[14] Access to the underlying records, in other words, was necessary to enable Certain-Teed to determine whether the summaries were, indeed, of "comparable" sales.

Judge Dumbauld ignored the issue of admissibility in his opinion for the Court of Appeals, addressing only the issue of relevance, which petitioner never raised. But the issue was not whether evidence of comparable sales, in his words, "seems acceptable as a reasonable approximation of the amount of damages . . ." 748 F.2d at 1155 (App. at 5a); it was whether the particular evidence plaintiff offered to prove comparable sales was admissible under the Federal Rules of Evidence. Clearly, it was not, and, since the summaries were the only evidence of damages plaintiff offered, their erroneous admission was reversible error. The Court of Appeals' refusal to address this simple point was a gross departure from the usual course of judicial proceedings, and a denial of justice. It should be summarily redressed by this Court.

(footnote continued from preceding page)

prepared the summary had testified at the trial. In this case, not only did the preparer *not* testify at the trial, but plaintiff did not even know whether he could be found.

[14] As the Court of Appeals ruled in its first opinion, plaintiff sold only to a select group of contractor-customers. 638 F.2d at 1067.

CONCLUSION

This Court grants writs of certiorari to review decisions where a court of appeals "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's powers of supervision." Supreme Court Rule 17(1)(a). It has not become "accepted" or "usual" for appellants to be denied the right to have a controlling issue considered and decided. But even if congested dockets were to make such conduct commonplace, it could not be condoned.

This Court should grant the writ and summarily remand this case to the Seventh Circuit with directions that it address and decide the principal issue raised by defendant on its appeal.

CERTAIN-TEED CORPORATION

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APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 83-2278, 83-2366

CONTRACTOR UTILITY SALES CO., INC.
Plaintiff-Appellee-Appellant

v.

CERTAIN-TEED CORPORATION
Defendant-Appellant-Appellee.

Appeal from the United States District Court for
Central District of Illinois
No. S-CIV-77-3086—Michael M. Mihn, *Judge*

ARGUED JUNE 7, 1984—DECIDED NOVEMBER 9, 1984

Before PELL and COFFEY, *Circuit Judges*, and DUMBAULD* *Senior District Judge*

DUMBAULD, *Senior District Judge*. Following lengthy and vigorously contested litigation, including a previous appearance before this Court,[1] plaintiff won a jury verdict of $802,000.00 compensatory and $3,000,000.00 punitive damages. Both parties appeal. We affirm. The basic facts are that defendant wished to replace plaintiff as an intermediary in selling defendant's polyvinylchloride pipe (PVCP) to contractors and to make direct sales to such

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* The Hon. Edward Dumbauld, U. S. Senior District Judge of the Western District of Pennsylvania, sitting by designation.

[1] *Contractor Utility Sales Co. Inc.* v. *Certain-Teed Product Corp.*, 638 F.2d 1061 (7th Cir. 1981).

customers. To accomplish this defendant (pursuant to its powers under its contract with plaintiff) obliged plaintiff to quote higher prices than defendant offered, after assuring plaintiff that it would be permitted to quote competitive prices. The trial judge moulded the verdict so as to award a single sum as compensatory damages, although separate claims had been submitted to the jury on breach of contract and fraud theories arising out of the same transactions. Defendant argues on appeal a variety of evidentiary and credibility issues, emphasizing inconsistencies in plaintiff's testimony, but we find that the jury's determination, under proper instructions, has resolved these questions and should not be disturbed.

For a full explanation of the course of the litigation it will be necessary to follow "a long, long trail a-winding" into the history of the relations and negotiations between the parties.

Plaintiff had been a distributor for defendant from 1965 to 1972, but then got a better deal from Robintech, a competitor. Later defendant found it needed the market share controlled by plaintiff, and plaintiff was displeased by Robintech's actions. Negotiations for takeover of plaintiff by defendant proved abortive.[2]

Then on September 2, 1975, the parties at defendant's corporate headquarters at Valley Forge, Pennsylvania, entered into the contract involved in the case at bar.[3] Disharmony soon arose, however. In the fall of 1976 Ray Blankenship, a friend of plaintiff's president Roy Lance, left Certain-Teed for Robintech, and plaintiff clandestinely sold Robintech pipe. In May 1977 plaintiff held back

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[2] Executives of defendant reasoned: "Why buy the cow if we can get the milk for nothing" by signing up plaintiff as an agent? The history of the parties' dealings and prior course of the litigation is fully described in 638 F.2d at 1067-71 and need be summarized only briefly here.

[3] Hence Pennsylvania law is accepted as governing by the parties and this Court, 638 F.2d at 1080, n. 23.

over a million dollars it had collected as agent for defendant, and defendant terminated the 1975 contract with plaintiff on May 31, 1977. It would have expired by its own terms on December 31, 1978.[4]

The contract of September 2, 1975 contained the customary integration clause, and also (without making any reference to a duty to ensure the "competitiveness" of prices) gave defendant the power to set prices. Defendant argues vigorously that the written contract does not mention the topic of competitiveness. But it seems clear that such omission is naturally to be expected in order to conform with the requirements of *U.S.* v. *General Electric Co.*, 272 U.S. 476, 484 (1926), regarding the establishment of a genuine agency.[5] And the jury was expressly instructed that evidence of the oral promise that prices set by defendant would be competitive should be considered only with respect to the fraud and unfair dealing aspects of the case, as distinguished from interpretation of the integrated written contract.[6]

The leading Pennsylvania case on the parol evidence rule (a doctrine strenuously argued by defendant) is

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[4] The trial court thus properly allowed damages up through December 31, 1978, as that date ended the period when plaintiff under the contract had the right to sell defendant's products.

[5] In Certain-Teed's "Strategic Plan," developed by William Krifsky and dated July 22, 1975, to increase market share by direct selling at the expense of independent agents, it is said: "The key to transitioning to a more flexible marketing approach emphasizing direct Certain-Teed sales as opposed to 'agents' turns out to be, paradoxically, changing our so-called agents to true agent status." [Plaintiff's Appendix, 48-49). In view of this situation the defendant's argument based upon the parol evidence rule and the integration clause loses strength, and plaintiff's case establishes "fraud in the factum."

[6] The theory of breach of an implied obligation to deal fairly and in good faith with the other contracting party (which remained in the case for retrial on remand, 638 F.2d at 1081) is in substance a metamorphosis of the fraud claim, and the trial judge appropriately eliminated duplication of damages in the verdict.

Gianni v. *Russell & Co. Inc.*, 281 Pa. 320, 323-24 (1924), which has been often cited and followed. See, *e.g.*, *United Refining Co.* v. *Jenkins*, 410 Pa. 126, 134 (1963); *Dunn* v. *Orloff*, 420 Pa. 492, 495-96 (1966). However, the integration rule yields to a properly established demonstration of fraud inducing and vitiating the execution of the written agreement. *Brentwater Homes* v. *Weibley*, 471 Pa. 17, 23 (1977).

In order to establish fraud, Pennsylvania, as many States do, requires proof of (1) false or fraudulent representation; (2) which defendant knew, or ought to have known, was false; (3) which is intended to be acted upon by plaintiff; (4) which in fact was acted upon and justifiably relied upon by plaintiff; (5) to his detriment. *Emery* v. *Third National Bank*, 314 Pa. 544, 548 (1934); *Neuman* v. *Corn Exchange Bank*, 356 Pa. 442, 450 (1947); *Lake* v. *Thompson*, 366 Pa. 352, 356 (1951); *Scaife Co.* v. *Rockwell-Standard Co.*, 466 Pa. 280, 285 (1971); *Weibley*, *supra*, 471 Pa. at 23; *Delehanty* v. *First Pennsylvania Bank*, 464 A.2d 1243, 1251-52 (Pa. Superior 1983). It is clear that under Pennsylvania law "A statement of present intention which is false when uttered may constitute a fraudulent misrepresentation of a fact." 471 Pa. at 23; *Watercolor Group* v. *Newbauer*, 468 Pa. 103, 115-16 (1976). As Bowen, L.J. observed long ago in *Edgington* v. *Fitzmaurice*, 29 Ch. Div. 459, 483 (1885): "The state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind, at a particular time, is, but if it can be ascertained it is as much a fact as anything else. A misrepresentation as to the state of a man's mind is, therefore, a misrepresentation of a fact." Such is likewise the law of Pennsylvania.

The jury in the case at bar was likewise instructed that proof of fraud must be "clear, precise and convincing." This instruction comports with the law of Pennsylvania, where "It is well settled that fraud must be proved by clear and convincing evidence." *Wagner* v. *Somerset Co. Memorial Park*, 372 Pa. 338, 341 (1943); *Gerfin* v. *Colonial Smelting & Refining Co.*, 374 Pa. 66, 67

(1953).[1] This test was met by plaintiff's testimony at the first trial and also at the second. Issues as to inconsistencies, conflicts, and credibility are for resolution by the jury.

With respect to evidentiary rulings, the trial court did not abuse its discretion. "We will reverse the court's ruling on the admissibility of expert testimony only upon a clear showing of abuse of discretion." *Spray-Rite Service Corp.* v. *Monsanto Co.*, 684 F.2d 1226, 1241 (7th Cir. 1982). This court on the prior appeal left to the trial court the question whether the testimony of plaintiff's expert Dr. Roger Kormendi was admissible to prove damages (638 F.2d at 1085 n. 32). Judge Baker had excluded it at the first trial as too speculative, and Judge Morgan at a pretrial on remand had reached the same conclusion. Judge Mihm adhered to that ruling, but permitted plaintiff, which would otherwise have had no proof of damages, to introduce calculations based on comparable sales by Robintech during the period of time involved. This type of evidence of sales in the same market of the same product, under the circumstances, seems acceptable as a reasonable approximation of the amount of damages when the fact of damage is established but the precise amount is not ascertainable with certainty. *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 272 U.S. 359, 379 (1927); *Spray-Rite Service Corp.* v. *Monsanto Co.*, 684 F.2d 1226, 1242 (7th Cir. 1982); *Darlington* v. *Bucks Co. Pub. Svce. Co.*, 303 Pa. 288, 293 (1931); *Hahn* v. *Andrews*, 182 Super. 338, 345 (1956); *Macan* v. *Scandinavia Belting Co.*, 264 Pa. 384, 392-93 (1919); *Scaife Co.* v. *Rockwell-Standard Corp.*, 446

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[1] Another familiar formulation of the standard is that "Evidence of fraud must be 'clear, precise, and indubitable' and the question of determining whether evidence presented is of that quality is a question of law. [citing Gerfin]. Where, however, the evidence meets this standard, it is for the jury to determine which evidence is true." *Highmont Music Corp.* v. *J.M. Hoffman Co.*, 397 Pa. 345, 350 (1959). See also *Ratay* v. *Lincoln Natl. Life Ins. Co.*, 378 F.2d 209, 212 (3d Cir. 1967); *Weibley, supra*, 371 Pa. at 23; *Scaife, supra*, 446 Pa. at 285; *Delehanty, supra*, 464 A.2d at 1252-53.

Pa. 280, 291 n. 5 (1971). The liberal attitude of Pennsylvania courts on this issue is shown by a recent Superior Court case, *Delehanty* v. *First Pennsylvania Bank*, 464 A.2d 1243, 1257-1261 (1983).[8] This accords with decisions of this Court. *Canada Dry Corp.* v. *Nehi Beverage Co., Inc.*, 723 F.2d 512, 522-23 (7th Cir. 1983); *Hannigan* v. *Sears, Roebuck & Co.*, 410 F.2d 285, 293 (7th Cir. 1969); *B. Constantino & Sons Co.* v. *New Amsterdam Casualty Co.*, 234 F.2d 902, 903-904 (7th Cir. 1956).

Plaintiff also assails the evidentiary rulings of the trial court, in excluding the expert's testimony and defendant's internal projections as speculative. But we are disinclined to overrule the discretion of the trial court in a matter where considerable uncertainty is inherent in the estimation of future probabilities, and the trial court can better assess the reliability of the witnesses and the data and procedures they employ. This is particularly true in the case at bar, where the volatile fluctuations of the pipe market are plainly shown by the price levels of PVC pipe in consecutive years, which varied widely in accordance with the vicissitudes of OPEC control over oil prices. We shall sustain the trial judge's rulings, which though assailed by both plaintiff and defendant, were fair and reasonable, and worked no injustice to either party.

The most troublesome questions presented on this appeal relate to the award of punitive damages and of "pre-judgment interest"[9] under Pennsylvania law.

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[8] The problems of a "new business" or "loss of good will" by speculative loss of future business by reason of defective quality product do not arise in the case at bar. Cf. *Harry Rubin & Sons* v. *Consolidated Pipe Co.*, 396 Pa. 506, 513 (1959). Plaintiff's was a valuable and well established business, as was recognized at the time of the acquisition negotiations. See also *Pugh* v. *Holmes*, 486 Pa. 272, 297 (1979).

[9] As stated by Judge Arlin Adams in *Peterson* v. *Crown Financial Corp.*, 661 F.2d 287, 293 (3rd Cir. 1981), "The law of Pennsylvania with respect to the rate of pre-judgment interest is far from perspicuous."

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However, it is clear that punitive damages are not a mere automatic incident of victory in proving a defendant's wrongful action; there must be something aggravated and outrageous about the conduct, calling for a remedy which will both punish the wrongdoer and deter others from like transgressions. To ensure that the penalizing monetary exaction will have a painful effect on the wrongdoer, it is permissible to show the financial condition or wealth of the defendant.

Nevertheless it is clear that in Pennsylvania, contrary to the rule in Illinois [*Hannigan* v. *Sears Roebuck & Co.*, 410 F.2d 285, 294 (7th Cir. 1969)] punitive damages must be proportional to the compensatory damages, and bear a reasonable relation thereto. *Hughes* v. *Babcock*, 439 Pa. 475, 481 (1944); *Givens* v. *W.J. Gilmore Drug Store*, 327 Pa. 278, 285 (1940); *Chambers* v. *Montgomery*, 411 Pa. 339, 344-45 (1963); *Delehanty* v. *First Pennsylvania Bank*, 464 Atl.2d 1243, 1262-66 (Pa. Superior 1983).[10] There can be no punitive damages if there are not compensatory damages. *Hilbert* v. *Roth*, 395 Pa. 270, 276 (1959).

In view of the familiar triple damages in anti-trust cases, there seemed some doubt as to whether the punitive damages here were excessive. In *Voltz* v. *General Motors Acceptance Corporation*, 332 Pa. 141, 145 (1938), an award of $2500 punitive damages was reduced to $1000 where the compensatory damages were $800. In *Givens*, *supra*, 337 Pa. at 285, it was said that in *Voltz* "punitive damages more than treble the actual damages, were declared excessive."

But later cases indicate that there is no fixed ratio which must be maintained. In the *First Pennsylvania Bank* a proportion of 11 to 1 was sustained. In *Chuy* v. *Philadelphia Eagles*, 598 F.2d 1265, 1279 (3rd Cir. 1979) a

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[10] In *Delehanty*, when the court reduced compensatory damages from $70,000 to $40,000, it made a corresponding reduction of the punitive damages from $750,000 to $440,000. 464 A.2d at 1266.

ratio of 6 to 1 was upheld. In view of all the circumstances we are unable to say that the figures in the case at bar are not in conformity with current Pennsylvania law.

We turn now to the question of pre-judgment interest. We begin by noting that "it is now the settled law in this Commonwealth that interest, as such, is not allowed in tort actions when the damages sought to be recovered are unliquidated." However, an exception to this rule is made in cases where the tort remedy consists in compensation for the destruction of property (as by fire) and it is possible to measure the amount of compensation by market value, or other definite standards.[11] *Marrazzo* v. *Scranton Nehi Bottling Co.*, 438 Pa. 72, 74 (1970). See also *Girard Trust Corn Exchange Bank* v. *Brink's Inc.*, 422 Pa. 48, 57 (1966).

For breach of contract the rule *certum est quod reddi potest* set forth in Restatement, Contracts § 337(a) is also the law of Pennsylvania. *Penneys* v. *Penna. R.R. Co.*, 408 Pa. 276, 279 (1962). The legal rate of interest is allowed in contract cases. *Peterson* v. *Crown Financial Corp.*, 661 F.2d 287, 292-95 (3rd Cir. 1981).[12] In that case the Third Circuit held that mere extortionate detention of money by a financial institution did not fall within Restatement § 337(a) but that the remedy was in the nature of equitable restitution of money unjustly received and that the court has discretion to award interest at a rate higher than the legal rate.

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[11] This compensation is not interest *eo nomine* or as a matter of right, but is compensation for delay, and discretionary, depending on the fault of the party causing the delay. *Hussey Metals Div.* v. *Lektromelt Furnace Div.*, 417 F. Supp. 964, 967 (W.D. Pa. 1976). See also *American Enka Co.* v. *Wicaco Machine Corp.*, 686 F.2d 1050, 1056 (3rd Cir. 1982); and *Peterson* v. *Crown Finance Corp.*, 661 F.2d 287, 294 (3rd Cir. 1981).

[12] The holding in this case is an application of *Sack* v. *Feinman*, 489 Pa. 152, 165-66 (1980).

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As Judge Aldisert explained in *American Enka Co.* v. *Wicaco Machine Corp.*, 686 F.2d 1050, 1056-57 (3rd Cir. 1982), the award under § 337(a) is properly described as "pre-judgment interest" but the award under the *Marrazzo* rationale is "damages for delay." In personal injury cases no damages for delay are recoverable, since the damages are not assessed until the date of trial. *Ibid.*, at 1056 n. 4.

Since the rate of "damages for delay" and "true prejudgment interest" are both measured at the legal rate of 6% it is immaterial whether the case at bar is treated as a tort or contract action.

It remains, however, to consider the effect of Supreme Court Rule 238. If applicable by its terms, this rule must be followed by federal courts as "outcome-determinative" under the doctrine of *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938). This was decided in *Jarvis* v. *Johnson*, 668 F.2d 740, 744-45 (3rd Cir. 1982). Paradoxically, the constitutionality of the Supreme Court's power to enact the rule was justified on the basis that it was procedural rather than substantive, and that its purpose was to encourage early settlement of cases (thus depriving insurance companies of the "float" on reserves for pending litigation and getting the money sooner to the injured plaintiffs).[13]

Under Rule 238 "damages for delay at ten (10) per cent per annum, not compounded" shall be added "to the amount of compensatory damages," but only in actions "seeking monetary relief for bodily injury, death or property damage, or any combination thereof."

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[13] *Laudenberger* v. *Port Authority*, 496 Pa. 52, 59, 71 (1981). The Supreme Court is empowered by Pa. Constn. art. V § 10(c) to "prescribe general rules governing practice, procedure, and the conduct of all courts ... if such rules ... neither abridge nor modify the substantive rights of any litigant ..."

In light of the legislative purpose we do not feel justified, in the absence of Pennsylvania decisions on the point, to accept plaintiff's argument that the words "property damage" in the Rule include the decline of plaintiff's profits from sales of PVC pipe by reason of defendant's machinations. We consider it more probable that the rule contemplates motor vehicle collisions, where "bodily injury, death or property damage" are often likely to occur in the same tort litigation.[14] This interpretation is strengthened by the fact that Rule 238 applies only to tort cases, not contract cases. *Reliance Universal Inc.* v. *Ernest Renda Contracting Co.*, 308 Pa. Super. 98, 107 (1982).[15]

Plaintiff's interpretation would seem to be a novel form of the now discredited dogma of "liberty of contract" as a property right. Roscoe Pound, *Jurisprudence* (1959) I, 95-96, 425. As Justice Holmes remarked on this subject: "By calling a business 'property' you make it seem like land ... An established business no doubt may have pecuniary value and commonly is protected by law against various unjustified injuries. But you cannot give it definiteness of contour by calling it a thing. It is a course of conduct...." *Truax* v. *Corrigan*, 257 U.S. 312, 342 (1921).

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[14] Property damage claims are ordinarily handled by arbitration among the insurance carriers rather than litigated in court.

[15] The terms of Rule 238 might embrace real estate or tangible property within the *Marrazzo* rule, *supra*, but according to the opinion of Judge Aldisert (a former Common Pleas Judge) in *Wicaco*, *supra*, "Although there are no Pennsylvania cases on point it also seems to us that there can be no duplication of common law damages for delay, and Rule 238 damages for the period between the filing of the complaint and the judgment." 686 F.2d at 1057.

We conclude that neither Rule 238 nor the *Marrazzo* exception to the general principle of denying prejudgment damages in case of unliquidated tort claims can be applied to augment the compensatory damages awarded to plaintiff by the jury.[16]

Likewise we can discover no current Pennsylvania authority for translating the amounts of damages awarded for ancient torts into currently depreciated dollars.

Accordingly, the judgment of the District Court is

Affirmed.

A true Copy:
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Clerk of the United States Court of Appeals for the Seventh Circuit

[16] And of course the punitive portion of the damage award can not be augmented under Rule 238. *Colodonato* v. *Conrail*, 307 Pa. Super. 478, 480 (1982), affirmed by the Supreme Court December 30, 1983.

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[186] MR. GILBERT: I disagree with—I don't disagree with the Court, but I just have a different recollection of that.

THE COURT: All right, that's fine.

MR. GILBERT: Now, on the second point, I think to complete the thought, all of the tendered materials which were prepared at Mr. Blankenship's request to assist him in connection with the deposition in this case are hearsay. They are not records of a regularly conducted business activity kept in the regular and ordinary course of the business as provided in the Business Records Exception to the Hearsay Rule, in the first place; in the second place—

THE COURT: You are talking about Robintech, too?

MR. GILBERT: Talking about Robintech. I think that's a fact that the Court has to take into consideration.

THE COURT: That ran through my mind a little bit.

MR. LONDRIGAN: Judge, if I understood, that was prepared from what was kept in the ordinary course of business. The only question of transcribing clerically from their actual records and providing that to Mr. Blankenship. And it was prepared at the time that Certain-Teed had issued a subpoena to several officials: Mr. Gould, Mr. Blankenship and a number of them down at Robintech so they could take their deposition.

So if computer-generated data is material prepared in the ordinary course of business, it was generated specifically for this trial. How they can argue that that isn't, [187] it would be absolutely inconsistent.

MR. GILBERT: I think, your Honor, the answer to this question is really an extraordinarily simple one. The computer data that we are talking about, and I think this is an important point, what we are dealing with here is a summary, as Mr. Londrigan suggested, prepared for a deposition which is a summary of computer data, bearing in mind the hoops that

we've had to jump through over the last couple of weeks in connection with our computer data. What they are asking us to accept is a handwritten summary of that data which is certainly under Rule 1006 a compilation of data which requires that the underlying data be introduced in advance of trial to give the other party a chance to read. The hearsay exception talks about the memorandum which is kept in the ordinary course of business and that memorandum report, as shown by the testimony of the custodian is regularly kept. That this is the sort of document that people prepare all the time in the business, they rely on it in the business, and that fits it within the exception. These documents satisfy neither one of those requirements.

THE COURT: This is what I was getting at earlier in the week when I suggested the two of you confer and let me know if there is a problem on the basis of information. As I understand the memorandum containing the handwritten notes from Mr. Blankenship, you got those, you are saying; is that correct?

MR. GILBERT: Yes, yes, we received those last Friday night.

[188] THE COURT: And you are saying you have not had access to the underlying data upon which those handwritten notes were based?

MR. GILBERT: That is exactly correct.

THE COURT: Is that correct?

MR. GILBERT: That is exactly correct.

THE COURT: What is the situation on the handwritten notes? Is the raw data not available or what?

MR. LONDRIGAN: I would suppose that it is available under subpoena the same way that Certain-Teed did it the first time around. But this was maintained, your Honor, for two or

three years. We did not have it until sometime before last trial setting, and it was compiled not by us as a matter of something that we assert. There is no reason for it to not fall within the exception to the hearsay rule as being kept as an independent business record.

THE COURT: I think your argument is it wasn't kept in the regular course of business, it was specifically prepared for purposes of this?

MR. GILBERT: There is no evidence that it was in the regular course of Robintech's business to prepare and use this document in its business. That is number one. Number two, we've got a real problem, I think, with 1060, the compilation and summary of other data which this clearly is as well.

THE COURT: Let me ask you this: to what extent—and I'm [189] talking about the hearing now—to what extent is it possible to make the raw data available?

MR. LONDRIGAN: It is not available to me. The data that we are talking about—Certain-Teed—is their own data.

THE COURT: I understand. You are saying you have never obtained the raw data from Robintech, the only thing you have received is the handwritten summary which you turned over to your accountant?

MR. LONDRIGAN: Which we found out existed and was going to be used by our accountant to verify or corroborate his projections as to the volume of sales. Mr. Gilbert raised at the last trial the issue of whether or not he consulted what sales he might have made if he stayed at Robintech. He said, "No, I have not done that."

THE COURT: Let me ask you this: based on your circumstances, how would he have any possibility of effectively even cross-examining on that or how would he have any way of effectively challenging the accuracy of those figures?

MR. LONDRIGAN: We produced, your Honor, the witness for cross-examination. We requested a compilation pursuant to a subpoena that was issued by Certain-Teed. His testimony was that it was prepared in the ordinary course of business and identified the individuals who had that responsibility and fulfilled that mission. The person that did that had no knowledge of why Mr. Blankenship requested those sales figures. It shows [190] on the face of the cover sheet, which we gave to Jeff Gilbert, that that is the case: he was the person who did the computer work, and he was asked as part of his duties in the ordinary course of business, which was Mr. Blankenship's response to compile that data.

THE COURT: Even if I accept that, though, what I am saying is I think part of his position is that he has no way of effectively at this point of either questioning checking, questioning or challenging the accuracy of the underlying raw materials.

MR. LONDRIGAN: I think once you reach the conclusion, once the foundation is laid that it is material that was generated and kept in the ordinary course of business, then it is an exception to the hearsay rule which provides a full right of confrontation. I don't think that there has been any showing through the under-oath testimony of this witness that there is any reason to believe that the person who had the administrative responsibilities, number one, for keeping and, number two, for compiling the data would have any reason to falsify. And that is the basis for the business entry rule and in keeping these business records in the ordinary course.

MR. GILBERT: I think I agree with that as a matter of legal theory. I would suggest, however, that a document prepared by a competitor of my client at the request of one of the plaintiff's best friends specifically for use in deposition, that that theory would not necessarily stand up. I'm not [191] suggesting any improprieties. I'm just saying there is a rule that addresses that type of situation as well. I think the point is that

the document itself is not a business record. It may be based—it is purportedly based on documents which are almost certainly business records, but it then is a summary of them which I am not in a position to be able to do anything with them and am supposed to accept them on the faith that this is an accurate summary of what are presumably business records. If I were to make the same suggestion with respect to our computer reports, I think that the response from counsel would be exactly the same.

MR. LONDRIGAN: Judge, if Ray Blankenship had the compilation or the records, I tend to agree with counsel if we brought someone else from Robintech and we didn't bring him. But when we bring the very person who he claims may give exception to that rule because he knows the parties that are involved here, he's under oath, subject to cross-examination, and he says a clerical employee prepared this and these records were kept in the ordinary course of business and identifies who that person is, subject to cross-examination and any impeachment as far as his motives for doing anything, I think you have an entirely different situation.

MR. GILBERT: It is not my job and I have been trying very hard to defend this case, I don't believe it is my job to lay a foundation for the plaintiff's evidence which they haven't [192] done. We are not talking about nickels and dimes. We are talking about millions of bucks and having been confronted with a situation of having to deal with this under the circumstances I think is really grossly unfair—not to me personally, which matters not, but to my client. This is not, you know, a five and dime operation. This is a very seriously maintained lawsuit with serious charges being asserted. And now 13 months after I was under the impression that this issue had been resolved, in the middle of the trial I am supposed to accept on faith a handwritten summary of some computer data so the plaintiff can get a million dollar number in front of the jury. And I think that would be grotesquely improper.

MR. LONDRIGAN: I don't know what to say to the Court other than that we have exercised as much diligence as we could in both cooperating on the computer data that has been tendered to us and also traveling and trying to determine the foundation, the basis for that evidence. And also with this Court's ruling and attempting to present the best proof available and possible to us.

THE COURT: On the one hand we have the defendant making, I think, a substantial argument that—I just don't think the argument is that this would to some extent deprive the ability to challenge the information. On the other hand, as I understand it, if I grant this motion—grant that objection—then the Robintech information is not available; is that correct?

[193] MR. LONDRIGAN: Yes.

THE COURT: Actually, I don't think the Court's decision can really be made on the basis of what the result of it would be as such. I think I have to make the decision based on the rules of law, and I'm going to deny the motion. There is no question that it does have substantial effect on it.

MR. GILBERT: Which motion did you deny?

THE COURT: Well, your objection to the use of the figures in effect on the basis that they are not records kept in the ordinary course of business.

MR. GILBERT: Hearsay?

THE COURT: Yes.

MR. GILBERT: It is plainly hearsay, and it is also a compilation of which I have not had a reasonable opportunity which the rule requires and—

THE COURT: That is my ruling on that subject.

I would like to meet with you at 8:30 Monday morning, and we will go over the question concerning the measure of damages.

(Whereupon the trial in the above-entitled matter was adjourned until Monday, March 7, 1983, at 8:30 o'clock a.m.

[USCA—7th Circuit
Received
May 21, 1984
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IN THE
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 83-2278 and No. 83-2366

CONTRACTOR UTILITY SALES CO., INC., *Plaintiff-Appellee-Appellant,* vs. CERTAIN-TEED CORPORATION, *Defendant-Appellant-Appellee.*	Appeal from the Central District of Illinois No. S-CIV-77-3086 Honorable Michael M. Mihm, Judge Presiding.

DEFENDANT-APPELLANT'S PETITION FOR REHEARING AND SUGGESTIONS FOR REHEARING IN BANC

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ISSUE PRESENTED FOR REVIEW

Whether the Court's failure to address the principal issue raised by defendant-appellant on this appeal entitles it to a rehearing where the effect of the Court's decision is to uphold a verdict for $3,802,000 in the absence of *any* competent evidence on the issue of damages.

IN THE
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 83-2278 and No. 83-2366

CONTRACTOR UTILITY SALES CO., INC., *Plaintiff-Appellee-Appellant,* vs. **CERTAIN-TEED CORPORATION,** *Defendant-Appellant-Appellee.*	Appeal from the Central District of Illinois No. S-CIV-77-3086 Honorable **Michael M. Mihm,** Judge Presiding.

DEFENDANT-APPELLANT'S PETITION FOR REHEARING AND SUGGESTIONS FOR REHEARING IN BANC

Defendant-Appellant requests rehearing and suggests rehearing *in banc.*

This case should be reheard *in banc* because Judge Dumbauld's opinion does not even mention the primary issue raised by Defendant on this appeal—*i.e.,* the erroneous admission, as the sole evidence of damages, of a handwritten, hearsay summary of voluminous records of a third party's sales in clear violation of the Federal Rules of Evidence. The entry of a judgment for $802,000 in compensatory damages was based solely on that inadmissible evidence. Under this Court's opinion in *Needham v. White Laboratories, Inc.,* 639 F.2d 394 (7th Cir. 1981), and unanimous authority from other circuits, the admission of that evidence over defendant's explicit objection constituted plain and reversible error, and, accordingly, there was no competent evidence on which the verdict and judgment could rest.

HISTORY OF PROCEEDINGS

This is the second appeal decided in this action which arises out of a sales agent's agreement entered into on September 2, 1975, and terminated, for cause, on May 31, 1977. Plaintiff claimed (a) that it was fradulently induced to enter the agreement by a promise that it would be kept "competitive," and (b) that Certain-Teed breached its implied obligation of good faith and fair dealing in its conduct under the agreement. The first appeal, decided by Judges Sprecher, Cummings and Bauer, resulted in the reversal of a judgment for plaintiff, and in the case being remanded for a new trial. *Contractor Utility Sales Co., Inc. v. Certain-Teed Corporation,* 638 F.2d 1061 (7th Cir. 1981).[1] The case was tried for the second time in March, 1983, and the jury returned a verdict for $802,000 in compensatory damages and $3 million in punitive damages on plaintiff's fraud claim, and $686,000 in compensatory damages for breach of contract. The trial court combined the verdicts and entered judgment against defendant for $3,802,000 on March 11, 1983.

Defendant's primary argument on appeal, and the first point in its brief on appeal, is that the trial court erred in admitting, as the sole evidence of plaintiff's alleged damages, handwritten documents purporting to summarize voluminous records of sales made by a third party. Brief of Defendant-Appellant at 11 *et seq.*;[2] P. Ex. 70. Without the erroneously admitted summaries, there was no evidence upon which the jury's verdict could have been based. The summaries were not shown to be based upon records that were themselves admissible in evidence, as is required by this Court's decision in *Needham, supra,* 639 F.2d at 403. Moreover, the records on

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[1] The Court also affirmed a directed verdict for defendant on plaintiff's antitrust claims.

[2] Defendant's initial brief will be identified, hereafter, as "D.Br." Defendant's reply will be designated "D.Reply." Plaintiff's briefs will be identified accordingly.

which the summaries were based were never even identified, much less made available for examination by defendant, as required by Rule 1006 of the Federal Rules of Evidence.[3]

Defendant's unanswerable argument that admission of the evidence, and resting the judgment upon it, was clear and prejudicial error, was simply ignored by Judge Dumbauld in his opinion for the panel. Refusal by a reviewing court to address an issue which, if addressed, would have required reversal, is such a gross departure from the accepted and usual course of judicial proceedings that rehearing *in banc* is called for.

Defendant was entitled to have this Court address and resolve the principal basis of its appeal. Under no circumstance was it justifiable simply to ignore appellant's primary argument, and certainly not in this case where the result is irreconcilable with prior decisions of this and other courts of appeal.

I. FOR REASONS THAT ARE NOT APPARENT, THIS COURT COMPLETELY IGNORED DEFENDANT'S PRIMARY ARGUMENT ON APPEAL.

In its required statement of "Issues Presented for Review," defendant identified four issues, the first of which was framed as follows:

1. Whether the trial court's admission of a hearsay summary of unidentified records of a third party as the sole

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[3] That rule states as follows:

> The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, *shall* be made available for examination of copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

(Emphasis Added).

> evidence of damages offered by plaintiff on either count of its complaint constituted reversible error.

D. Br. at vii. The panel did not address that issue. Instead, Judge Dumbauld addressed plaintiff's damages proof solely in terms of its relevance, an issue which had never been raised by defendant. Slip Op. at 5-6. There is not a single word in the Court's opinion which even acknowledges the existence of the issue defendant *did* raise, let alone addresses it.

The evidence in question purports to summarize sales of various products, during the period 1974-1979, made by Robintech Corp., one of defendant's competitors for whom plaintiff had been a sales agent before entering an agency agreement with defendant. Copies of the summaries (P.Ex. 70) are attached to this petition, and are also included in Defendant's Appendix at pp. 23-35. At the trial, plaintiff contended that the summaries represented sales it would have made had it remained an agent of Robintech instead of being fraudulently induced to become an agent of Certain-Teed.

Certain-Teed's objection to this evidence, which it vigorously asserted in both the trial court and on this appeal, was that the handwritten sales summaries were not admissible evidence of what plaintiff was trying to prove because they were hearsay, and because plaintiff had not complied with the plainly-prescribed requirements of Rule 1006. Judge Dumbauld ignored these arguments, and concluded only that evidence of comparable sales "seems acceptable as a reasonable approximation of the amount of damages. . . ." Slip Op. at 5. But the issue was not whether comparable sales can be a "reasonable approximation of damages;" it was whether the summaries were competent proof of comparable sales.

The only foundation plaintiff attempted to lay for the admission of these summaries at trial was through the testimony of Raymond Blankenship, a Robintech employee and close personal friend of plaintiff's president. Mr. Blankenship

testified that the summaries had been prepared by someone in Robintech's data processing department at the witness' request to assist him in preparing for a deposition in this case in October, 1979.[4] Plaintiff never argued, much less proved, (a) that the summaries were prepared at or about the time of the events summarized, or (b) that it was the regular practice of Robintech to maintain and use those documents in the ordinary course of its business. In fact, because (a) the summaries were prepared in the Fall of 1979 and purport to reflect sales in the years 1975-1978, and (b) they were prepared specifically for Mr. Blankenship's use in this litigation, the proof was to the contrary. The documents were thus not admissible as business records pursuant to Rule 803(6) of the Federal Rules of Evidence ("Records of regularly conducted activity"). D.Br. at 15-16. *United States v. Lemire,* 720 F.2d 1327, 1350 (D.C. Cir. 1983) (Rule 803(6) does not allow admission of document recorded one year and ten months after events described); *Campbell v. Nordco Products,* 629 F.2d 1258, 1265 (7th Cir. 1980) (Rule 803(6) does not allow admission of records prepared for litigation, even if prepared by a non-party).

Nor were the summaries admissible under Federal Rule of Evidence 1006. First, the documents purportedly summarized were not themselves shown to be admissible as required by this Court's opinion in *Needham v. White Laboratories, Inc.,* 639 F.2d 394, 403 (7th Cir. 1981). Accord: *United States v. Johnson,* 594 F.2d 1253, 1255 (9th Cir. 1979), *cert. denied,* 444 U.S. 965 (1979):

> The district court erred in not requiring the proponent of the summary to establish a foundation. It was incorrect to

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[4] No reference to the summaries was made in the deposition, the documents were not produced, and defendant had no knowledge that they even existed until the day before the trial started. D. Reply at 26, n. 15.

> suggest that the opponents had the burden of determining that a foundation was lacking.
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> * * *
>
> We hold that under [Rule 1006] the proponent of the summary must establish that the underlying materials upon which the summary is based are admissible in evidence.

In fact, the underlying records in this case were never even identified. Second, they were not made available to defendant for examination as required by the express language of Rule 1006. Without a proper foundation, admission of the summaries over defendant's objection was plain and reversible error. *Square Liner 360 v. Chisum,* 691 F.2d 362, 376 (8th Cir. 1982);[5] *United States v. Kim,* 595 F.2d 755, 764 (D.C. Cir. 1979). This Court recently reaffirmed that rule in *Canada Dry Corp. v. Nehi Beverage Co.,* 723 F.2d 512, 523 (7th Cir. 1983), in which Judge Cudahy wrote that "Rule 1006 of the Federal Rules of Evidence requires that a party against whom a summary exhibit is sought to be admitted must be accorded adequate time to examine the documents underlying the summary in order to check its accuracy."[6]

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[5] In *Chisum,* the court held that it was error to have admitted a summary, without the underlying records having been made available, even though the person who prepared the summary testified at the trial. Cusco's argument that Certain-Teed waived its objection to the summaries by rejecting plaintiff's suggestion, made after the trial was half over, that Certain-Teed depose the person who prepared them if he could be found, thus has no merit. D. Br. at 18-19.

[6] In its reply brief, plaintiff cited this case in support of its argument that Certain-Teed had somehow waived its objection to admission of the Robintech summaries. P. Reply at 8-9. Admission of the evidence was affirmed in *Canada Dry,* however, because appellant had challenged it on other grounds

(Footnote continued on following page.)

> The requirement of Rule 1006 that the original or duplicate writings . . . be made available for examination . . . at a reasonable time and place acts as a condition precedent which must be fulfilled before a summary . . . may be admitted as evidence. Rule 1006 does not give the judge discretionary power to waive this condition.

5 Weinstein's Evidence, ¶ 1006[04], pp. 1006-8.

Rule 1006 is intended to give the opponent of summary evidence some basis for defending against it, which even Judge Mihm recognized Certain-Teed was unable to do in this case. Tr. V at 189-193. Certain-Teed had no basis for determining what types of records had been summarized, much less whether the records or the summary were accurate. Moreover, even if accuracy had not been an issue, the failure to allow Certain-Teed to examine those records effectively denied it the right to cross-examine the proponent of the summary. For instance, the underlying records might have shown that the summaries included sales of unrelated products, or sales that were not made to the select group of contractors with whom Cusco had done business.[7] D.Br. at 20-22. Access to the underlying records, in other words, was necessary to enable Certain-Teed to determine if the summaries were, indeed, of comparable sales. Given the obvious importance of these records, Judge

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(Footnote continued from preceding page.)

at the trial than those which were raised, for the first time, on appeal. 723 F.2d at 523. The defect in the evidence complained of there was apparent on the face of the document in question, but its accuracy was not challenged until after the trial was over. In the case at bar, Certain-Teed objected to admission of the Robintech sales summaries on precisely the same grounds relied on on appeal, and, unlike the case in *Canada Dry,* because the underlying records were never made available to it, had no means of challenging their accuracy. See, generally, D.Br. at 14-15, and D.Reply at 27-32.

[7] As this Court ruled in its first opinion, plaintiff sold to a select group of contractor-customers. 638 F.2d at 1067.

Dumbauld's finding that the evidence "seems acceptable as a reasonable approximation of the amount of damages . . ." is inexplicable.

Perhaps Judge Dumbauld accepted plaintiff's contention, as had Judge Mihm, that, unless the summaries were admitted, it would have had no proof of damages. Slip Op. at 5. But this would not have excused non-compliance with the Rules of Evidence, even if it had been true, which it was not. Plaintiff admitted at trial that it had had the summaries for months before the trial started, and that it had always intended to use them to bolster its damages case. D.Br. at 13; D. Reply at 29-30. If the summaries accurately reflected sales plaintiff would have made had it remained an agent of Robintech, there was no reason why it could not have laid the necessary foundation for their admission, had it chosen to do so. Yet plaintiff failed even to inform defendant of the summaries' existence until the day before the trial started. Thus, even if this Court were to create a twenty-fifth exception to the hearsay rule for cases where the proponent has no other way to prove its case, that exception would not apply here.[8]

On appeal, plaintiff attempted to rationalize admission of the Robintech summaries by arguing that Rule 703 (Bases of Opinion Testimony by Experts) should apply. But no foundation was laid under this rule either. Indeed, like Rule 803(24), it was not even mentioned at the trial, and plaintiff's certified public accountant, its only expert, testified that he had "no independent basis whatsoever for verifying or corroborating" the data represented in the Robintech summaries. Tr. VI at

[8] In fact, there already is a "catch-all" exception to the hearsay rule in Rule 803(24). But that rule, like Rule 1006, expressly requires advance notice of the proponent's intent to rely on it which was not done in this case. Moreover, the trial court was not asked to make the findings required by subparts (B) and (C), nor would the record support such findings.

170. The trial judge made no finding that the summaries could properly be relied upon by a certified public accountant under Rule 703, nor, unlike *United States v. Lawson,* 653 F.2d 299, 302, n. 7 (7th Cir. 1981), was there any basis on which such a finding could have been made. Plaintiff's expert explained the type of records accountants rely on, and his testimony makes it clear that a handwritten summary of voluminous sales records prepared for a deposition would not qualify. Tr. VI at 89, D.Reply at 32-34.

If this Court can explain why the admission of the Robintech summaries did not constitute reversible error, it should do so. If, as defendant believes is the case, their admission over defendant's objection constituted plain and prejudicial error, the judgment should be reversed.

II. JUDGE DUMBAULD'S OPINION CONTAINS A NUMBER OF OTHER ERRORS WHICH SUGGEST THAT DEFENDANT'S APPEAL WAS NOT GIVEN THE ATTENTION IT DESERVED.

Defendant raised a number of other arguments on its appeal that were not properly addressed or resolved in the opinion:

(1) Judge Dumbauld expressed concern about the size of the punitive damages award (Slip Op. at 7)—an issue which neither party raised—but he made no mention of defendant's argument that evidence it had offered in mitigation of the punitive damages claim had been improperly excluded. D.Br. at 48.

(2) His conclusion that the trial court "properly allowed damages up through December 31, 1978, as that date ended the period when plaintiff under the contract had the right to sell defendant's products," shows a fundamental misunderstanding of the theory on which

plaintiff's claim for fraud damages was tried.[9] Plaintiff sought to prove the sales it would have made had it remained an agent of Robintech under a contract that would have lasted only through the end of 1976. D.B. at 45-47. Thus, plaintiff's contract with Certain-Teed was irrelevant to its fraud claim.

(3) Although the Court concluded that plaintiff had sustained its heavy burden of proving fraud "by plaintiff's testimony at the first trial and also at the second" (Slip Op. at 5), it ignored the fact that plaintiff's president had testified to three separate and irreconcilable versions of the allegedly false promise. D.Br. at 30-31, 39. In addition, although the alleged fraud was based on a promise to keep plaintiff "competitive," plaintiff's president testified that he was aware, before he signed the agreement, that Certain-Teed had *not* promised to keep him competitive. D. Br. at 35.

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[9] The Court's conclusion that plaintiff's agreement with defendant lasted until December 31, 1978, is also difficult to reconcile with its determination that the contract was actually terminated on May 31, 1977. Slip Op. at 3, n. 4.

III. CONCLUSION.

The effect of this Court's opinion is to sanction plain and prejudicial error. defendant suggests that the judgment entered on the verdict must be reversed due to the absence of any competent proof on the issue of damages. The fraud claim should be remanded for a retrial on both damages and liability, but the Court should enter judgment for Defendant on the contract claim for the reasons set out at pages 22-28 of the Brief of Defendant-Appellant.

CERTAIN-TEED CORPORATION

By: /s/ GEOFFREY G. GILBERT
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CERTIFICATE OF SERVICE

I certify that two true and correct copies of the foregoing DEFENDANT-APPELLANT'S PETITION FOR REHEARING AND SUGGESTIONS FOR REHEARING IN BANC were served upon each of the counsel of record by depositing the same on November 21, 1984, in the U.S. mail located at Three First National Plaza, Chicago, Illinois 60602, enclosed in an envelope with first class postage prepaid thereon, addressed as follows:

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United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

December 13, 1984

Before

Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. WILBUR F. PELL, JR., *Senior Circuit Judge*
Hon. EDWARD DUMBAULD, *Senior District Judge**

Nos. 83-2278, 83-2366

CONTRACTOR UTILITY SALES CO., INC. *Plaintiff-Appellee-Appellant,* *vs.* **CERTAIN-TEED CORPORATION,** *Defendant-Appellant-Appellee.*	Appeal from the United States District Court for the Central District of Illinois No. S-CIV-77-3086 **Michael M. Mihm,** *Judge.*

ORDER

On consideration of the petitions for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by both of the parties, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny rehearing. Accordingly,

IT IS ORDERED that the aforesaid petitions for rehearing be, and the same are hereby, DENIED.

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* The Honorable Edward Dumbauld, United States Senior Judge of the Western District of Pennsylvania, is sitting by designation.